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11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 DURK BANKS, et al.,

17 Defendants.

No. CR 24-621(B)-MWF

GOVERNMENT'S OPPOSITION TO  
DEFENDANT ASA HOUSTON'S MOTION TO  
DISMISS COUNT 4 OF THE SECOND  
SUPERSEDING INDICTMENT

Hearing Date: November 18, 2025  
Hearing Time: 1:30 p.m.  
Location: Courtroom of the  
Hon. Michael W.  
Fitzgerald

21 Plaintiff United States of America, by and through its counsel  
22 of record, the Acting United States Attorney for the Central District  
23 of California and Assistant United States Attorneys Ian V. Yanniello,  
24 Gregory W. Staples, and Daniel H. Weiner, hereby files its Opposition  
25 to Defendant Asa Houston's Motion to Dismiss Count 4 of the Second  
26 Superseding Indictment (Dkt. 248) in the above-captioned trial. The  
27 Motion has been joined by defendants Durk Banks, David Brian Lindsey,  
28 and Deandre Dontrell Wilson.

1        This Opposition is based upon the attached memorandum of points  
2 and authorities, the files and records in this case, and such further  
3 evidence and argument as the Court may permit.

4        Dated: October 27, 2025

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Count 4 of the Second Superseding Indictment ("SSI") charges defendants with a violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), (B)(ii), (j)(1), 2(a) for use, carry, and discharge of firearms --- including a machinegun --- during and in relation to, and possession of such firearms in furtherance of, two predicate crimes of violence: (i) Murder for Hire Resulting in Death, in violation of 18 U.S.C. § 1958(a) (as charged in Count 2); and (ii) Stalking Resulting in Death, in violation of 18 U.S.C. §§ 2261A(2)(A), (B), 2261(b)(1) (as charged in Count 3).

After further consideration, the government has elected not to proceed on the murder-for-hire predicate for Count 4 because that conviction carries a mandatory minimum penalty of life imprisonment. Therefore, a § 924(c) conviction with that predicate does not impact the ultimate sentence. With respect to the stalking predicate, the government now elects to proceed only under §§ 2261A(2)(A), 2261(b)(1) -- i.e., that the defendants engaged in course of conduct that placed the victims in reasonable fear of death or serious bodily injury, resulting in S.R.'s death --- not under § 2261A(2)(B).<sup>1</sup>

Accordingly, the only question now before the Court is whether the current version of 18 U.S.C. §§ 2261A(2)(A) is a crime of violence. Although no court of appeals has yet addressed this issue, every district court that has done so has found that it is a crime of violence. The Court should follow suit and hold the same.

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<sup>1</sup> The government may proceed on a narrower charge than contained in the SSI. See, e.g., United States v. Wilbur, 674 F.3d 1160, 1178 (9th Cir. 2012).

1 **II. STALKING IN VIOLATION OF SECTION 2261A(2) (A) IS A CRIME OF**  
2 **VIOLENCE**

3 **A. The Categorical and Modified Categorical Approaches**

4 Under the elements clause of Section 924(c), a crime of violence  
5 is defined as a felony offense that "has as an element the use,  
6 attempted use, or threatened use of physical force against the person  
7 or property of another." 18 U.S.C. § 924(c) (3) (A).

8 In determining whether a crime falls within the elements clause  
9 and thus constitutes a crime of violence, the court applies the  
10 categorical approach. United States v. Buck, 23 F.4th 919, 924 (9th  
11 Cir. 2022). Under the categorical approach, "[t]he only relevant  
12 question is whether the federal felony at issue always requires the  
13 government to prove -- beyond a reasonable doubt, as an element of  
14 its case -- the use, attempted use, or threatened use of force."  
15 United States v. Taylor, 596 U.S. 845, 850 (2022).

16 "However, if the predicate statute is comprised of various  
17 offenses, it is 'divisible,' so courts must apply the modified  
18 categorical approach." United States v. Howald, 104 F.4th 732, 740  
19 (9th Cir.), cert. denied, 145 S. Ct. 781 (2024). "[I]f the statute  
20 of conviction is divisible, and if one of the alternative versions of  
21 the crime would qualify as a crime of violence under the elements  
22 clause, [the court] then determine[s], using certain permitted  
23 sources, whether the offender was convicted under that part of the  
24 divisible statute." Buck, 23 F.4th at 924. "In that circumstance,  
25 the modified categorical approach 'permits a court to determine which  
26 statutory phrase was the basis for the conviction by consulting the  
27 trial record -- including charging documents, plea agreements,  
28 transcripts of plea colloquies, findings of fact and conclusions of

1 law from a bench trial, and jury instructions and verdict forms.'" Id. (quoting Johnson v. United States, 559 U.S. 133, 144 (2010)).

3 **B. Legal Standards Governing Divisibility**

4 "A statute is divisible when it 'list[s] elements in the  
5 alternative, and thereby define[s] multiple crimes.'" Buck, 23 F.4th  
6 at 924 (quoting Mathis v. United States, 579 U.S. 500, 505 (2016)).  
7 A statute is not divisible if it merely lists alternative means of  
8 committing the same crime. Id.; see also Mathis, 579 U.S. at 506.

9 A statute presents disjunctive elements, and not simply  
10 alternative factual means of committing a single offense, when it  
11 criminalizes actions "concerning different conduct and involving  
12 different proof." Buck, 23 F.4th at 925. For example, Buck held  
13 that the aggravated version of 18 U.S.C. § 2114 (assaulting and  
14 robbing a mail carrier) is divisible into separate aggravated  
15 offenses because one alternative requires use of a dangerous weapon  
16 in a way that puts the life of the victim in danger, another  
17 alternative requires that the victim was wounded but does not require  
18 use of a dangerous weapon, and the third alternative requires only  
19 that the defendant have a previous conviction for the same offense.  
20 Id. at 925-26. Similarly, the hate crime in 18 U.S.C. § 249(a)(2) is  
21 divisible into completed and attempt offenses because the attempt  
22 offense contains its own additional element. Howald, 104 F.4th at  
23 741. That statute also contains divisible basic and aggravated  
24 offenses, and the aggravated offense is further divisible based on  
25 the particular aggravating circumstance. Id.

26 **C. The Stalking Statute is Divisible**

27 "If a statute is indivisible and criminalizes a broader range of  
28 conduct than would fit the federal definition of a crime of violence,



1 there is no categorical match, and that ends the inquiry.” Buck, 23  
2 F.4th at 924. Defendant contends that is the situation here. He is  
3 wrong. The modified categorial approach applies because Section  
4 2261A is divisible into at least four parts. United States v. Ali,  
5 No. 24-cr-20341, 2025 WL 2938420, at \*2 (S.D. Fla. 2025).

6 First, “the statute is plainly divisible between § 2261A(1) and  
7 § 2261A(2).” Id. This is because § 2261A(1) requires that the  
8 government prove a defendant “travel[ed] in interstate or foreign  
9 commerce or [was] present within the special maritime and territorial  
10 jurisdiction of the United States, or enter[ed] or le[ft] Indian  
11 country,” whereas § 2261A(2) requires proof of entirely different  
12 conduct, namely that a defendant “use[d] the mail, any interactive  
13 computer service or electronical communication service or electronic  
14 communication system or interstate commerce, or any other facility of  
15 interstate or foreign commerce[.]” See id.; United States v. Bacon,  
16 No. CR 18-75-LPS, 2021 WL 5051364, at \*12 (D. Del. 2021); United  
17 States v. Abarca, No. 22-CR-20505, 2024 WL 1643174, at \*6 (S.D. Fla.  
18 2024), report and recommendation adopted, No. 22-CR-20505, 2024 WL  
19 1637343 (S.D. Fla. 2024).

20 Second, the statute further criminalizes various forms of  
21 stalking, each of which concern “different conduct and involving  
22 different proof.” Buck, 23 F.4th at 925. Relevant here, Subsection  
23 (2) of § 2261A sets forth two distinct ways it can be violated: (A)  
24 engaging in conduct that “places that person in reasonable fear of  
25 the death of or serious bodily injury” to a small category of victims  
26 (the “Fear of Death or Serious Injury Prong”); and (B) engaging in  
27 conduct which “causes, attempts to cause or would be reasonably  
28 expected to cause substantial emotional distress” (the “Emotional

1 Distress Prong"). The wording of the statute alone makes clear that  
2 the conduct enumerated at subsections (A) and (B) involve different  
3 elements. The Fear of Death or Serious Injury Prong criminalizes  
4 conduct that puts a person in "reasonable fear of the death of or  
5 serious bodily injury to" a victim and immediate family members. On  
6 the other hand, the Emotional Distress Prong broadens the  
7 criminalized conduct to that which "causes, attempts to cause, or  
8 would be reasonably expected to cause substantial emotional  
9 distress." The language of the statute dictates that these are  
10 alternative elements, rather than means, since they require different  
11 actions. See, e.g., Ali, 2025 WL 2938420, at \*2; United States v.  
12 Johnson, No. 24-CR-20110, 2025 WL 1520055, at \*6 (S.D. Fla. 2025),  
13 report and recommendation adopted, No. 24-20110-CR, 2025 WL 1517219  
14 (S.D. Fla. 2025) (holding that 18 U.S.C. §§ 2261A(2)(A) and (B) "are  
15 alternative *elements*, rather than *means*, because they require  
16 different actions. Given that the subsections address different  
17 harms and protect different enumerated groups, it would be illogical  
18 to ask the jury to find either, but not agree on which one.")  
19 (emphasis in original); Ali, 2025 WL 2938420, at \*2 (same);  
20 Abarca, 2024 WL 1643174, at \*6 (same).

21 Defendant does not meaningfully challenge the divisibility of  
22 § 2261A(2)(A); indeed, he does not even discuss divisibility between  
23 § 2261A(1) and § 2261A(2), nor divisibility between subsections  
24 (2)(A) and (2)(B). Rather, his primary contention is that the  
25 statute is not divisible based on the alternative means for  
26 satisfying the *means rea* element of § 2261A(1) --- i.e., intent to  
27 "kill, injure, harass, or intimidate." The government agrees that  
28 the multiple means of proving intent are not distinct elements, but

1 that does not change the plain distinction between the different  
2 types of *conduct* the government must prove between a violation of  
3 § 2261A(1) or (2), and between a violation of § 2261A(2) (A) or (B).

4 Defendant further argues that § 2261A is not divisible because  
5 Count 3 of the SSI lists all the alternative types of conduct. But  
6 in quoting Mathis, upon which he relies (Mot. at 13-14), defendant  
7 omits critical language from that opinion that the court must look to  
8 the “indictment and correlative jury instructions.” Mathis, 579 U.S.  
9 at 519 (emphasis added). Here, had the government elected to proceed  
10 on offenses beyond § 2261A(2) (A), the jury instructions would have  
11 required the jury to unanimously agree on which particular elements  
12 supported conviction.

13 Finally, defendant notes that one district court has found that  
14 a prior version of § 2261A was not divisible. United States v.  
15 Minners, No.05-CR-0152-CVE-02, 2020 WL 4275040, at \*5 (N.D. Okla.  
16 2020). But since Minners, the statute has twice been amended.<sup>2</sup>

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17  
18 <sup>2</sup> In 2013, Congress restructured § 2261A by adding a “conduct”  
19 requirement, so travel or surveillance alone no longer sufficed.  
20 Compare Pub. L. 109-162, Title I, § 114(a), Jan. 5, 2006, 119 Stat.  
21 298 (requiring that a criminal’s “travel places [a victim] in  
22 reasonable fear of the death of, or serious bodily injury to, or  
23 causes substantial emotional distress . . .”) with Pub. L. 113-4,  
24 Title I, § 107(b), Mar. 7, 2013, 127 Stat. 77 (adding the requirement  
25 that a defendant “engages in conduct” placing a person in reasonable  
26 fear of the death of, or serious bodily injury to” a limited category  
27 of victims). Additionally, the 2013 amendments distinguished between  
conduct that: (i) placed a person in reasonable fear of the death of  
or serious bodily injury to” one of three categories of victims; (ii)  
caused, attempted to cause, or would be reasonably expected to cause  
substantial emotional distress to one of the same three categories of  
victims; and (iii) cyberstalking that either (a) causes reasonable  
fear of death or serious bodily injury, or (b) caused, attempted to  
cause, or would be reasonably expected to cause substantial emotional  
distress, to the same three types of victims. Pub. L. 113-4, Title I,  
§ 107(b), Mar. 7, 2013, 127 Stat. 77.

28 In 2018, Congress further distinguished subsection (2) (A) from  
subsection (2) (B) when it expanded the list of protected groups of  
(footnote cont’d on next page)

1 This Court should therefore follow every district court that has  
2 considered the divisibility of the current version of § 2261A and  
3 hold that it is divisible and subject to the modified categorical  
4 approach. Ali, 2025 WL 2938420, at \*2; Johnson, 2025 WL 1520055, at  
5 \*6; Bacon, 2021 WL 5051364, at \*13; Abarca, 2024 WL 1643174, at \*6;  
6 2021 WL 5051364, at \*12. Each of these cases distinguishes Minners  
7 based on the subsequent amendments to the statute.

8 **D. Section 2261A(2) (A) is Categorically a Crime of Violence**

9 Because the Court should apply the modified categorical  
10 approach, the Court can look to the additional documents, including  
11 the SSI, to aid in its analysis. Here, as described above, the  
12 government has elected to proceed only on a violation of 18 U.S.C.  
13 §§ 2261A(2) (A), 2261(b) (1) as the predicate crime of violence to  
14 support the 18 U.S.C. §§ 924(c), (j) count.

15 As now narrowed in Counts 3 and 4 of the SSI, the statute  
16 requires the government to prove the defendants: (i) "with the intent  
17 to kill, injure, harass, intimidate, or place under surveillance with  
18 intent to kill, injure, harass, and intimidate"; (ii) used facilities  
19 of interstate commerce; (iii) to "engage in a course of conduct" that  
20 placed the victims "in reasonable fear of death or serious bodily  
21 injury"; (iv) resulting in death. 18 U.S.C. §§ 2261A(2) (A),  
22 2261(b) (1). The statute defines "serious bodily injury" as: "bodily  
23 injury which involves --(A) a substantial risk of death; (B) extreme  
24

25 victims under Section 2261A's subsections (1) (A) and (2) (A), but  
26 specifically refused to do so for subsection (2) (B). See Pub. L. 115-  
27 334, Title XII, § 12502(a) (1), Dec. 20, 2018, 132 Stat. 4982 (adding  
28 that the Fear of Death or Serious Injury Prong criminalized conduct  
that puts a person in reasonable fear of the death of or serious  
bodily injury to "the pet, service animal, emotional support animal,  
or horse of that person," but not amending the Emotional Distress  
Prong to include those victims). Johnson, 2025 WL 1520055, at \*6.

1 physical pain; (C) protracted and obvious disfigurement; or (D)  
2 protracted loss or impairment of the function of a bodily member,  
3 organ, or mental faculty." 18 U.S.C. § 1365(h)(3). Thus, a  
4 conviction under section 2261A(2)(A) requires that the government  
5 prove the defendants "engage[d] in some kind of volitional conduct"  
6 placing the victim in *reasonable* fear of death or injury. United  
7 States v. Griffin, No. 2:17-CR-20639-TGB-MKM, 2022 WL 2071054, at \*5  
8 (E.D. Mich. 2022). Fear alone is insufficient.

9 As multiple district courts have reasoned, it is "impossible to  
10 conceptualize an instance where an individual engages in a 'course of  
11 conduct' that puts someone in 'reasonable fear of the death of or  
12 serious bodily injury' [to himself or another] without engaging in  
13 conduct that, at minimum, threatens the use of physical force to a  
14 person." Ali, 2025 WL 2938420, at \*4 (quoting Johnson, 2025 WL  
15 1520055, at \*10); Bacon, 2021 WL 5051364, at \*14 ("If the  
16 hypothetical defendant intentionally communicates with the victim in  
17 a way that causes reasonable fear of death or serious bodily injury,  
18 that communication necessarily involves at least the threatened use  
19 of physical force."); United States v. Elkins, 725 F. Supp. 3d 570,  
20 576 (N.D. Tex. 2024) ("The Court has a difficult time imagining a  
21 case where an actor commits a violation under §§ 2261A(2) and  
22 2261(b)(1)-(3), with the requisite level of intention and harm, and  
23 does not also intentionally attempt or threaten to use force.").<sup>3</sup>

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25 <sup>3</sup> A crime of violence requires "force capable of causing  
26 physical pain or injury to another person." Johnson v. United  
27 States, 559 U.S. 133, 140 (2010). This so-called Johnson-level force  
28 "does not require any particular degree of likelihood or probability  
that the force used will cause physical pain or injury, only  
potentiality." Stokeling v. United States, 586 U.S. 73, 84 (2019)  
The force may be indirect and involve no actual bodily contact.

(footnote cont'd on next page)

1 This analysis is consistent with the Ninth Circuit's reasoning  
2 in holding, for example, that completed Hobbs Act robbery is a crime  
3 of violence. See United States v. Eckford, 77 F.4th 1228, 1236 (9th  
4 Cir.), cert. denied, 144 S. Ct. 521 (2023) (citing with approval the  
5 Fourth Circuit's reasoning in United States v. Mathis, 932 F.3d 242,  
6 266 (4th Cir. 2019), that fear of injury "necessarily involves  
7 the threat to use physical force").

8 In sum, because a violation of § 2261A(2)(A) requires at least  
9 the threatened use of physical force, it is categorically a crime of  
10 violence.

11 **E. At the Very Least, the Stalking Statute is Divisible as to**  
12 **the Basic and Aggravated (Death-Resulting) Offenses, and**  
13 **the Death-Resulting Offense at Issue Here is a Crime of**  
**Violence**

14 Even if the basic version of 18 U.S.C § 2261A(2)(A) does not  
15 constitute a crime of violence, it is a crime of violence when the  
16 conduct results in death.

17 A statute is divisible when it contains different maximum  
18 penalties. "If statutory alternatives carry different punishments,  
19 then under Apprendi they must be elements." Mathis, 579 U.S. at 518;  
20 see also Buck, 23 F.4th at 925 (18 U.S.C. § 2114(a) is divisible into  
21 basic and aggravated offense because the basic offense is punishable  
22 by no more than ten years and the aggravated offense carries a  
23 maximum penalty of 24 years).

24 Here, the penalty for a violation of § 2261A increases to  
25 imprisonment "for life or any term of years, if death of the victim  
26 results," as charged in Count 4. 18 U.S.C. § 2261(b)(1). Because  
27

28 Delligatti v. United States, 604 U.S. 423, 429, 432 (2025) ("causing  
bodily harm by omission requires the use of force").

1 § 2261(b) provides for different maximum penalties depending on the  
2 extent of the victim's injury caused by the conduct, § 2261A is  
3 divisible into basic and aggravated offenses. Griffin, 2022 WL  
4 2071054, at \*3 (aggravated offense under § 2261A is divisible).

5 Griffin concluded that a violation of § 2261A(1) resulting in  
6 death is a categorical crime of violence because a crime requiring  
7 proof of death necessarily requires at least a threat of violent  
8 (Johnson-level) physical force. Id. at \*5. Griffin relied on precedent  
9 from the First and Sixth Circuits holding that an offense requiring  
10 proof of serious physical injury or resulting in death necessarily  
11 involves the use of the violent physical force required by Johnson.  
12 2022 WL 2071054, at \*5-\*6 (citing United States v. Verwiebe, 874 F.3d  
13 258, 261 (6th Cir. 2017), abrogated on other grounds by Borden v.  
14 United States, 593 U.S. 420 (2021), and United States v. Tsarnaev, 968  
15 F.3d 24, 104 (1st Cir. 2020), rev'd in part on other grounds, 595 U.S.  
16 302 (2022)). This circuit has adopted a similar rule. See Villagomez  
17 v. McHenry, 127 F.4th 113, 119 (9th Cir. 2025) (although Nevada simple  
18 battery does not require Johnson-level force, aggravated battery  
19 requiring substantial bodily harm -- defined as "prolonged physical  
20 pain" -- "necessarily requires deploying Johnson-level force").

21 Defendant offers no realistic contrary scenario. The  
22 requirement that "death results" from the stalking requires a but-for  
23 causal connection between the stalking and the death. See  
24 Delligatti, 2025 WL 875804, at \*6; Burrage v. United States, 571 U.S.  
25 204, 214 (2014) ("a phrase such as 'results from' imposes a  
26 requirement of but-for causation"). Thus, it would not suffice, for  
27 example, to show that the victim happened to die of natural causes  
28 while being stalked. See Burrage, 571 U.S. at 214.

1 In addition to requiring violent physical force (i.e., force  
2 capable of causing physical pain or injury to another person), a  
3 crime of violence requires more than reckless conduct. Borden, 593  
4 U.S. at 423. Defendant contends that the death-resulting element  
5 contains no separate mens rea requirement, see United States v.  
6 McDuffy, 890 F.3d 796, 797-98 (9th Cir. 2018) (aggravated bank  
7 robbery offense under 18 U.S.C. § 2113(e) when death results requires  
8 only the mens rea necessary to commit the underlying bank robbery),  
9 and thus can include deaths that are not intentional. But defendant  
10 misunderstands the intent required for a crime of violence -- it is  
11 not the harm or result (death) that must be intended, but the use (or  
12 threatened use) of physical force. See Borden, 593 U.S. at 430-34.  
13 The statute requires that the defendant engage in the prohibited  
14 course of conduct "with the intent to kill, injure, harass,  
15 intimidate, or place under surveillance with the intent to kill,  
16 injure, harass, or intimidate another person." 18 U.S.C.  
17 § 2261A(2) (A). Because of this intent requirement, the threatened  
18 use of force cannot be merely reckless or negligent, even if the  
19 resulting death is unintended.

20 Accordingly, at the very least, § 2261A(2) (A) is divisible as to  
21 the basic and death-resulting offenses, and the death-resulting  
22 offense on which the government intends to proceed at trial is a  
23 crime of violence.

### 24 **III. CONCLUSION**

25 For the foregoing reasons, the Court should hold that 18 U.S.C.  
26 § 2261A is divisible, and that 18 U.S.C. §§ 2261A(2) (A), 2261(b) (1)  
27 as charged in the SSI is a crime of violence under the elements  
28 clause of § 924(c).